

RECESSED PAVEMENT AREA JOINT USE AGREEMENT

STATE OF TEXAS §
 §
COUNTY OF TARRANT §

THIS RECESSED PAVEMENT AREA JOINT USE AGREEMENT ("Agreement") is made and entered into by and between the City of Fort Worth, a municipal corporation of Tarrant County, Texas, hereinafter referred to as the "City," acting herein by and through its duly authorized Assistant City Manager and Stockyards Hotel, LLC, a Texas limited liability company, hereinafter referred to as "Grantee."

W I T N E S S E T H:

WHEREAS, Grantee owns the real property and operates the Stockyards Hotel at 109 E. Exchange Ave., Fort Worth, Texas 76104 (the "Property") which is located at the heart of the Fort Worth Stockyards National Historic District (the "Stockyards District"); and

WHEREAS, The Stockyards District was established in 1976 to preserve the Stockyards Hotel and all other structures located in the Stockyards District so that the western history legacy of Fort Worth that exists in those structures and that was created by pioneering settlers, cowboys, cattle ranchers and Chisholm Trail cattle drives would never be lost; and

WHEREAS, The Stockyards Hotel is unique in Fort Worth, being the original cattlemen's hotel built in 1907 and expanded in 1913 serving the Fort Worth Stockyards and the Live Stock Exchange, and the Stockyards Hotel's continued preservation and operation is critical to the future of the Stockyards District; and

WHEREAS, E. Exchange Avenue is the location where the City's Longhorn Herd are driven twice each day, cowboys ride horses, policemen ride horses, visitors ride in horse drawn carriages or are photographed sitting on Longhorn Steers or gather to walk about enjoying the atmosphere that is slower and stress free, much like the days gone by, and the City desires to continue to preserve this unique atmosphere because it is critical to the continued attraction of the City's many tourists and the resulting financial benefits and it is a necessary element to the historical preservation of the historic west; and

WHEREAS, The Stockyards District is the most popular tourist attraction in the City of Fort Worth, as well as one of Texas' most popular tourist destinations, attracting people from all over the world seeking the atmosphere of the historic west and to authentically experience the meaning of the Fort Worth motto, "Where the West Begins"; and

WHEREAS, In order to ensure that the Stockyards District, a Fort Worth treasure, is preserved for generations to come the City has a desire to preserve and promote the Stockyards

District, which is in the public's best interest, by ensuring that the Stockyards Hotel can continue to operate and make its critical contribution to the success of this unique historic district; and

WHEREAS, Because the Stockyards Hotel depends solely on valet parking in order to function and operate, and without it, would cease operations, and because it is in the public's best interest to preserve and promote the Stockyards Hotel so that the Stockyards District can be preserved and promoted, it is in the public's best interest to insure that the Stockyards Hotel has sufficient valet parking available; and

WHEREAS, The Stockyards Hotel was remodeled in 1984 to a style befitting the former glory days of Texas cattlemen and consistent with Fort Worth's motto "Where the West Begins" and since this remodel was completed, a paved area, outside of the traffic lanes and defined by a cut out in the sidewalk on E. Exchange Ave. in front of the Stockyards Hotel, which area is depicted on Exhibit "A" (the "Recessed Pavement Area"), has been continually used by the Stockyards Hotel as a necessary part of its valet parking operation; and

WHEREAS, Although the Recessed Pavement Area is within the right-of-way which includes E. Exchange Ave., the Stockyards Hotel's use of it does not interfere with the public's use of the traffic lanes in the street; and

WHEREAS, In addition to the use of the Recessed Pavement Area, the Stockyards Hotel has also been consistently granted by the City valet parking permits to use a portion of the traffic lane on E. Exchange Ave. and a portion on N. Main St. for valet parking operations, (the "Traffic Lane Valet Parking Areas"), which are necessary to provide adequate valet parking operations for the Stockyards Hotel; and

WHEREAS, The City of Fort Worth and Grantee desire to enter into this Agreement to provide Grantee use of the Recessed Pavement Area so that Grantee can use it related to operations and maintenance of the Stockyards Hotel, including but not limited to parking, operating valet parking operations and loading and unloading operations in order to continue to operate and be a significant contributor to the preservation and promotion of the City of Fort Worth, the Fort Worth Stockyards National Historic District, and "Where the West Begins, all of which is in the public's best interest; and

WHEREAS, Texas Transportation Code Chapter 316 allows the City to prescribe the use of a portion of a municipal street, right-of-way or sidewalk for public conveniences and amenities for the abutting and underlying fee owner, which is Grantee, and for a private purpose if the use does not interfere with the public use of the street or sidewalk or create a dangerous condition on the street or sidewalk; and

WHEREAS, the City has determined that providing Grantee with the use of the Recessed Pavement Area is: (i) in the best interest of the public because it will ensure that The Stockyards Hotel can continue to operate and preserve and promote the Stockyard's District and will provide a public convenience and amenity for the visitors to and public use of the Stockyards District, all of which is a greater public interest than use of the Recessed Pavement Area; and (ii) will not

interfere with the public use of the traffic lanes of the street or pedestrian use of the sidewalk or create a dangerous condition on the street or sidewalk.

NOW THEREFORE, for good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, including the, mutual covenants contained herein, the parties hereto hereby agree as follows:

A. Recessed Pavement Area.

1. The City hereby grants to Grantee permission to use the Recessed Pavement Area for Grantee's purposes solely related to operations and maintenance of the Stockyards Hotel, including but not limited to parking, operating valet parking operations and loading and unloading operations during the Term and each Renewal Term. Grantee shall have exclusive use of the Recessed Pavement Area so long as the use does not unreasonably interfere with City's rights and obligations to the Recessed Pavement Area. The parties agree that the Recessed Pavement Area is exempt from the Valet Parking Ordinance existing at the execution of this Agreement. Grantee shall have the right to determine how it uses the Recessed Pavement Area, so long as it does not interfere with City's rights to the Recessed Pavement Area, and there shall be no time limits imposed on Grantee's use as it relates to how long Grantee allows a vehicle, bus, carriage, horse, trailer, truck, or other occupant to park in or occupy the Recessed Pavement Area. City acknowledges that Grantee's activities, if within the scope of permission and conforming to the terms and conditions of this Agreement, do not, as of the date of the City's execution of this permission set forth below, unreasonably interfere with City's rights and obligations to the Recessed Pavement Area. City will coordinate with Grantee for any access or use that may affect Grantee's use of the Recessed Pavement Area. Nothing in this Agreement shall be construed to prevent Grantee from continuing to obtain a valet parking permit issued by the City to operate valet parking operations in the Traffic Lane Valet Parking Areas or other locations within the City's public rights-of-way and that are not licensed for use under separate agreement, all of which shall remain subject to the Valet Parking Ordinance.
2. City may enter and utilize the Recessed Pavement Area at any time for the purpose of installing or maintaining improvements necessary for the health, safety and welfare of the public. In this regard, Grantee understands and agrees that City shall bear no responsibility or liability for damage or disruption of improvements installed by Grantee or its successors, but City will make reasonable efforts to minimize such damage.
3. Grantee understands and agrees that the granting of permission to use the Recessed Pavement Area hereunder is not meant to convey to Grantee any right to use or occupy property in which a third party may have an interest, and Grantee agrees that it will obtain all necessary permission before occupying such property.

B. Payment.

Grantee agrees to pay to City at the time this Agreement is executed an amount of \$8,037.30 for the use of the Recessed Pavement Area and shall pay the same amount annually thereafter, payable on the anniversary date of the execution of this Agreement for each year of use (the "Fee").

C. Term and Termination.

The term of this Agreement shall be for thirty (30) years, commencing on the date this Agreement is executed by the City of Fort Worth (the "Term"). This Agreement may be renewed upon written notice of either party for additional periods of thirty (30) years each at the expiration of the then Term or Renewal Term (each a "Renewal Term"). This Agreement may be terminated by either party for breach of this Agreement by providing the other party written notice identifying the breach and providing thirty (30) days to cure the breach. After thirty (30) days, if the breach is not cured, the non-breaching party may immediately terminate this Agreement. This Agreement shall terminate thirty days after Grantee permanently ceases to operate a hotel on the Property. If Grantee temporarily ceases hotel operations for any reason, including but not limited to construction, remodeling, repairs, damages caused by fire, wind, storm, flood, terrorism or other causes, but intends to reopen as a hotel, then Grantee shall not be considered to have permanently ceased hotel operations and this Agreement shall not terminate. It is further understood and agreed that the Recessed Pavement Area, is held by City as trustee for the public; that City exercises such powers over the Recessed Pavement Area as have been delegated to it by the Constitution of the State of Texas or by the Texas Legislature; and that City cannot contract away its duty and its legislative power to control any public right-of-way. If at any time during the Term or any Renewal Term if the City determines in its sole but reasonable discretion to use or cause or permit the Recessed Pavement Area to be used for any other public purpose, including but not limited to, underground, surface or overhead communication, drainage, sanitary sewerage, transmission of natural gas or electricity, or any other public purpose, whether presently contemplated or not, due to the fact that no reasonable alternative exists to locate such items in an area outside the Recessed Pavement Area, and either party determines that such use and Grantee's use of the Recessed Pavement Area are in conflict, either party may terminate or abate with a reduction in the fee paid during such abatement, this Agreement by providing notice to the other. If this Agreement is terminated on a day other than the anniversary date, then any portion of the Fee paid for the remaining period of the year shall be refunded to Grantee.

D. Independent Contractor.

Grantee covenants and agrees that it shall operate as an independent contractor as to all rights and privileges granted hereunder and not as an officer, agent, servant or employee of City and Grantee shall have exclusive control of and the exclusive right to control the details of its operations, and all persons performing same, and shall be solely responsible for the acts and omissions of its officers, agents, servants, employees, contractors, subcontractors, licensees and

invitee. The doctrine of respondeat superior shall not apply as between City and Grantee, its officers, agents, servants, employees, contractors and subcontractors, and nothing herein shall be construed as creating a partnership or joint enterprise between City and Grantee.

E. Indemnification of City.

GRANTEE COVENANTS AND AGREES TO INDEMNIFY AND DOES HEREBY INDEMNIFY, HOLD HARMLESS AND DEFEND CITY, ITS OFFICERS, AGENTS, SERVANTS AND EMPLOYEES, FROM AND AGAINST ANY AND ALL CLAIMS OR SUITS FOR PROPERTY DAMAGE OR LOSS AND/OR PERSONAL INJURY, INCLUDING DEATH, TO ANY AND ALL PERSONS, OF WHATSOEVER KIND OR CHARACTER, WHETHER REAL OR ASSERTED, ARISING OUT OF OR IN CONNECTION WITH, DIRECTLY OR INDIRECTLY, THE USES GRANTED HEREUNDER, TO THE EXTENT CAUSED BY THE NEGLIGENCE OF GRANTEE OR GRANTEE'S OFFICERS, AGENTS, SERVANTS, EMPLOYEES, OR CONTRACTORS; AND GRANTEE HEREBY ASSUMES ALL LIABILITY AND RESPONSIBILITY FOR SUCH CLAIMS OR SUITS. GRANTEE SHALL LIKEWISE ASSUME ALL LIABILITY AND RESPONSIBILITY AND SHALL INDEMNIFY CITY FOR ANY AND ALL INJURY OR DAMAGE TO CITY PROPERTY ARISING OUT OF OR IN CONNECTION WITH ANY AND ALL ACTS OR OMISSIONS OF GRANTEE, ITS OFFICERS, AGENTS, SERVANTS, EMPLOYEES, CONTRACTORS, SUBCONTRACTORS, OR LICENSEES IN THE RECESSED PAVEMENT AREA. THE PARTIES AGREE THAT THE DUTIES AND OBLIGATION CONTAINED IN THIS PARAGRAPH SHALL SURVIVE THE TERMINATION OF THIS AGREEMENT.

F. Certificate of Insurance.

1. While this Agreement is in effect, Grantee agrees to furnish City with a Certificate of Insurance, naming City as certificate holder, as proof that it has secured and paid for a policy of public liability insurance covering all public risks related to the proposed use and occupancy of public property as located and described in Exhibit "A." The amounts of such insurance shall not be less than the following:

\$1,000,000 Commercial General Liability

with the understanding of and agreement by Grantee that such insurance amounts shall be revised upward at City's option and that Grantee shall so revise such amounts immediately following notice to Grantee of such requirement. Such insurance policy shall provide that it cannot be canceled or amended without at least ten (10) days prior written notice to the Building Official of the City of Fort Worth. A copy of such Certificate of Insurance is attached as Exhibit "B." Grantee agrees to submit a similar Certificate of Insurance annually to City on the anniversary date of the execution of this Agreement.

2. Grantee agrees, binds and obligates itself, its successors and assigns, to maintain and keep in force such public liability insurance at all times during the term of this Agreement and until the removal of all encroachments and the cleaning and restoration of the city streets. All insurance coverage required herein shall include coverage of all Grantee's contractors.

G. Record Recordation.

An original of this Agreement shall be filed with the City's City Secretary's Office.

H. Enforcement Attorney Fees.

In any action brought by either party for the enforcement of this Agreement, the prevailing party shall be entitled to recover interest and reasonable attorney's fees.

I. Assignment.

Grantee may assign all or any of its rights, privileges or duties under this Agreement to any person or entity that is a successor in title to the Property or becomes the owner of the Stockyards Hotel. Grantee shall provide City thirty (30) days written notice prior to any assignment. This Agreement shall be binding upon the parties hereto, their successors and assigns.

J. Compliance with Laws, Ordinances, Rules and Regulations.

Grantee agrees to comply with all applicable federal, state and local laws, ordinances, rules and regulations. If the City notifies Grantee of any violation of such laws, ordinances, rules or regulations, Grantee shall immediately desist from and correct the violation.

K. Notices.

Notices required pursuant to the provisions of this Agreement shall be conclusively determined to have been delivered when (1) hand-delivered to the other party, its agents, employees, servants or representatives, or (2) received by the other party by United States Mail, registered, return receipt requested, addressed as follows, or such other addresses as may be provided in writing:

TO THE CITY:

City of Fort Worth
With Copy to the City Attorney
Attn: Jesus J. Chapa, Assistant City Manager
at same address
1000 Throckmorton
Fort Worth TX 76102

TO GRANTEE:

Stockyards Hotel, LLC
Attn: Robert H. McLean, Manager
109 E. Exchange Ave.
Fort Worth, Texas 76104

With a copy to

Hunter T. McLean
Whitaker Chalk Swindle & Sawyer, PLLC
301 Commerce St.
Suite 3500
Fort Worth, Texas, 76102

L. Governmental Powers.

It is understood and agreed that by execution of this Agreement, the City does not waive or surrender any of its governmental powers.

M. No Waiver.

The failure of the City or Grantee to insist upon the performance of any term or provision of this Agreement or to exercise any right granted herein shall not constitute a waiver of the City's or Grantee's respective right to insist upon appropriate performance or to assert any such right on any future occasion.

N. Governing Law and Venue.

This Agreement shall be construed in accordance with the laws of the State of Texas. If any action, whether real or asserted, at law or in equity, is brought on the basis of this Agreement, venue for such action shall lie in state courts located in Tarrant County, Texas or the United States District Court for the Northern District of Texas, Fort Worth Division.

O. Amendments.

No amendment of this Agreement shall be binding upon a party hereto unless such amendment is set forth in a written instrument, and duly executed by an authorized representative of each party.

P. Third Party Beneficiaries.

This Agreement is intended for the benefit of the parties hereto and their successors and permitted assigns only. There are no third party beneficiaries hereof.

Q. Entirety of Agreement.

This Agreement, including any exhibits attached hereto and any documents incorporated herein by reference, contains the entire understanding and agreement between the City and Grantee, their assigns and successors in interest, as to the matters contained herein. Any prior or contemporaneous oral or written agreement is hereby declared null and void to the extent in conflict with any provision of this Agreement.

EXECUTED this _____ day of _____, 201_.

CITY
City of Fort Worth

GRANTEE
Stockyards Hotel, LLC

BY: _____
Jesus J. Chapa
Assistant City Manager

By: _____
Name: Robert H. McLean
Title: Manager

ATTEST:

Mary Kayser, City Secretary
M&C: _____
Date: _____

Approved As To Form and Legality

Jessica Sangsvang
Assistant City Attorney

STATE OF TEXAS §
 §
COUNTY OF TARRANT §

BEFORE ME, the undersigned authority, a Notary Public in and for the State of Texas, on this day personally appeared _____, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he/she executed the same for the purposes and consideration therein expressed, as the act and deed of the City of Fort Worth, and in the capacity therein stated.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this ____ day of _____, 20____.

Notary Public in and for the
State of Texas

STATE OF TEXAS §
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BEFORE ME, the undersigned authority, a Notary Public in and for the State of Texas, on this day personally appeared _____, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he/she executed the same for the purposes and consideration therein expressed, as the act and deed of _____, and in the capacity therein stated.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this ____ day of _____, 20____.

Notary Public in and for the
State of Texas